New South Wales Civil and Administrative Tribunal - Appeal Panel

Samimi v Commissioner for Fair Trading, Department of Customer Service [2020] NSWCATAP 7 (17 January 2020)

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Civil and Administrative Tribunal
New South Wales

Case Name:	Samimi v Commissioner for Fair Trading, Department of Customer Service
Medium Neutral Citation:	[2020] NSWCATAP 7
Hearing Date(s):	13 September 2019
Date of Orders:	17 January 2020
Decision Date:	17 January 2020
Jurisdiction:	Appeal Panel
Before:	Dr R Dubler SC, Senior Member Dr J Lucy, Senior Member
Decision:	(1) To the extent that leave to appeal is required, it is refused. (2) The appeal is dismissed. (3) The respondent's name is amended to Commissioner for Fair Trading, Department of Customer Service.
Catchwords:	APPEAL - Civil and Administrative Tribunal (NSW) – Home Building – Review of decision to refuse application for contractor licence – Whether Tribunal denied appellant procedural fairness – Whether Tribunal biased – Whether Tribunal had regard to an irrelevant consideration – Whether the Tribunal's decision was legally unreasonable

Legislation Cited:	Civil and Administrative Tribunal Act 2013 (NSW)
	Crimes (Sentencing Procedure) Act 1999 (NSW)
	Home Building Act 1989 (NSW)
	Interpretation Act 1987 (NSW)
Cases Cited:	Ballantyne v WorkCover Authority (NSW) [2007] NSWCA 239
	Burns v Corbett [2017] NSWCA 3; (2017) 96 NSWLR 247
	Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd [1994] FCA 1074; (1994) 49 FCR 576
	Drake v Minister for Immigration and Ethnic Affairs (1979) 2 ALD 60
	Edwards v Commissioner for Fair Trading, Department of Finance, Services and Innovation [2019] NSWCATAP 208
	F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry [1975] AC 295
	Giddings v Australian Information Commissioner [2017] FCA 677
	Ikimdzhieva t/as C & L Upholstery Services v Fudala [2017] NSWCATAP 196
	Kirk v Industrial Court of New South Wales (2010) 239 CLR 531; [2010] HCA 1
	Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24
	Minister for Immigration and Border Protection v Eden [2016] FCAFC 28; (2016) 240 FCR 158
	Minister for Immigration and Border Protection v Stretton [2016] FCAFC 11; (2016) 237 FCR 1
	Minister for Immigration and Border Protection v SZVFW

	[2018] HCA 30; (2018) 92 ALJR 713
	Minister for Immigration and Citizenship v Li [2014] FCAFC 1; (2013) 249 CLR 332
	Minister for Immigration and Multicultural Affairs v Bhardwaj [2002] HCA 11; (2002) 209 CLR 597
	Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69
	Re JRL; Ex parte CJL [1986] HCA 39; (1986) 161 CLR 342
	Re Minister for Immigration and Multicultural Affairs; Ex parte Miah (2001) 206 CLR 57
	Reid v Commercial Club (Albury) Ltd [2014] NSWCA 98
	Samimi v Queensland Building and Construction Commission [2015] QCA 106
	Samimi v Queensland Building Services Authority [2013] QCAT 472
	SBBA v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCAFC 90
	South Western Sydney Area Health Services v Edmonds [2007] NSWCA 16
	SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs [2006] HCA 63; (2006) 228 CLR 152
	Wootten v Godfrey [2019] NSWCATAP 255
Texts Cited:	None cited
Category:	Principal judgment
Parties:	Kamran Samimi (Appellant)
	Commissioner for Fair Trading, Department of Customer Service (Respondent)
Representation:	Solicitors;

	Hugh Ford, (Appellant)
	NSW Fair Trading Legal Services (Respondent)
File Number(s):	AP19/30612
Publication Restriction:	Nil
Decision under appeal:	
Court or Tribunal:	NSW Civil and Administrative Tribunal
Jurisdiction:	Occupational Division
Citation:	[2019] NSWCATOD 86
Date of Decision:	6 June 2019
Before:	J McAteer, Senior Member
File Number(s):	2018/00174315

REASONS FOR DECISION

Introduction

1. This was an appeal from a review of a decision of the Commissioner for Fair Trading to refuse Mr Samimi's application for a contractor licence. The Tribunal upheld the Commissioner's decision.
2. Mr Samimi claimed, on appeal, that the Tribunal was biased, that it had regard to irrelevant considerations, that it acted unreasonably and that it ambushed him at the hearing.
3. For the reasons which follow, we have dismissed the appeal.

Background

4. Mr Samimi was the holder of a contractor licence under the *Home Building Act 1989* (NSW). He was also the holder of a building authority in Queensland.

Queensland litigation concerning insurance

5. In about 2006, a company of which Mr Samimi was a director entered into a residential building contract with the owner of a property. Relations between the parties deteriorated and the owner terminated the contract.
6. In 2011, the Queensland Civil and Administrative Tribunal, in proceedings between the owner and the Queensland Building and Construction Commission, determined that the owner was entitled to $400,000 from the Commission, under a statutory insurance scheme. The Commission paid the owner that amount.
7. The Commission then sought to recover the amount of $400,000 it had paid to the owner from Mr Samimi and another director of the building company. It did so in reliance on statutory provisions which provided that the Commission could recover the amount of a

payment, under the statutory insurance scheme, as a debt from the building contractor or any other person through whose fault the claim arose.

8. On 1 September 2014, the District Court of Queensland entered summary judgment in favour of the Queensland Building and Construction Commission against the Samimis. The Samimis were ordered to pay the Commission $400,000 plus interest and costs.

9. On 19 June 2015, the Queensland Court of Appeal found that the District Court should not have entered summary judgment because there was a factual dispute relevant to the Commission's prospects of success (*Samimi v Queensland Building and Construction Commission* [2015] QCA 106). It allowed the appeal, set aside the District Court's orders and dismissed the Commission's application for summary judgment.

Queensland building authority

10. In or around 2011 or 2012, Mr Samimi's bank appointed itself as controller over the property owned by a development company of which he was a director. He thereby became an "excluded individual" under the *Queensland Building Services Authority Act 1991* (Qld) and lost the entitlement to work as a builder in Queensland.

11. On 12 July 2012, the Queensland Building Services Authority decided not to categorise him as a "permitted individual" under the *Queensland Building Services Authority Act 1991* (Qld). Had it done so, he would have been able to work as a builder in Queensland.

12. Mr Samimi sought review of that decision by the Queensland Civil and Administrative Tribunal. That tribunal affirmed the decision of the Queensland Building Services Authority. It found that Mr Samimi did not take all reasonable steps to avoid the circumstances leading to the appointment of a controller of his company. In particular, it found that he engaged in "financial brinkmanship" with his bank and that, had he acted reasonably, he would have made a substantial payment in reduction of the company's debt (*Samimi v Queensland Building Services Authority* [2013] QCAT 472 at [30]).

13. Ms Samimi's Queensalnd building licence was cancelled in 2014.

14. Mr Samimi applied for a building licence in Queensland under mutual recognition in 2017. This application was refused by the Queensland Building and Construction Commission on 28 June 2017.

Failure to insure

15. In February 2017, Yong Construction Group Pty Ltd, a company of which Mr Samimi was a director, entered into a home building contract with an owner of a property in Redfern. Mr Samimi was involved in negotiating the contract and was responsible for the day to day management of the works. Work commenced in March 2017 without home warranty insurance, which is required by the *Home Building Act*.

16. The owner paid Mr Samimi, or his company, money under the home building contract.

17. The owner alleged that the work was defective. Upon a certifier inspecting the property in April 2017, the certifier informed the owner to stop all work on the property until the home warranty insurance had been paid. Mr Samimi then produced an insurance certificate in the name of another company (that is, not in the name of the company which had contracted to do the work). Both the owner and the certifier demanded that the work stop immediately.

18. At the time that Yong Construction Group Pty Ltd entered into the contract, both its contractor licence and Mr Samimi's contractor licence had a condition that they were only to enter into contracts not requiring insurance.

NSW contractor licence

19. Mr Samimi applied to renew his contractor licence in October 2012 and October 2015. He did not disclose that he had been the director of a company placed under external administration in either application.
20. On 18 October 2017, Mr Samimi's contractor licence was cancelled because the Commissioner was not satisfied that Mr Samimi was a fit and proper person to be the holder of a contractor licence (*Home Building Act*, ss 22(1)(h), 20(1)(a)).

Application for new contractor licence

21. A week later, Mr Samimi applied for a new contractor licence.
22. On 4 January 2018, the Commissioner's delegate refused Mr Samimi's application for a contractor licence under s 20(1)(a) of the *Home Building Act*, on the ground that the delegate was not satisfied that Mr Samimi was a fit and proper person to hold a contractor licence. The delegate relied partly upon findings of the Queensland Building and Construction Commission, when refusing Mr Samimi's mutual recognition application. These findings concerned offences committed by companies of which Mr Samimi was a director, insurance claims debts said to be owing to the Commission, the provision of false and misleading information and the commission of offences by Mr Samimi. The delegate also relied upon Mr Samimi's failure to declare that his company was placed in external administration when renewing his licence in 2012 and 2015, and the failure to declare the District Court judgment on the 2015 renewal application form.
23. The internal reviewer affirmed the decision.
24. Mr Samimi applied to the Tribunal for an administrative review.

Tribunal's decision

25. The Tribunal in turn affirmed the Commissioner's decision. It also found that Mr Samimi was not a fit and proper person to hold a contractor licence.
26. The Tribunal summarised Mr Samimi's submissions in relation to the Queensland insurance dispute. Having acknowledged that Mr Samimi's evidence and submissions in relation to this matter had assisted his case to some degree, the Tribunal identified "the real issue" as being the reasons why these matters were not disclosed to the Commissioner (at [62]). The Tribunal indicated that the matters which should have been disclosed included judgment debts, liquidations and insurance claims (at [63]). The Tribunal also referred to Mr Samimi's failure to obtain insurance and to unchallenged evidence concerning the poor quality of his work (at [66]).
27. The Tribunal found that Mr Samimi was ultimately responsible for the submission of his renewal applications which failed to disclose matters of which he was well aware. It

indicated that it had difficulty in accepting that Mr Samimi genuinely believed that the matters he did not disclose did not require disclosure (at [78]-[79]).

Name of respondent

28. The respondent was named in the proceedings below, and on appeal, as the Department of Fair Trading. The Department of Fair Trading is not a legal entity. Nor is it the decision-maker.

29. The application in the Tribunal was for a review of the decision of the Commissioner for Fair Trading, Department of Finance, Services and Innovation to refuse Mr Samimi's application for a contractor licence, pursuant to s 20(1) of the *Home Building Act*. The correct respondent is therefore the Commissioner.

30. The Department of Finance, Services and Innovation was abolished by cl 7(2) of the Administrative Arrangements (Administrative Changes—Public Service Agencies) Order 2019. Clause 7(3) provides that "a reference in any document to the Department of Finance, Services and Innovation is to be construed as a reference to the Department of Customer Service." It also provides that the persons employed in the Department of Finance, Services and Innovation are, except as provided by the Order, transferred to the Department of Customer Service (cl 7(1)).

31. We have made an order, of our own motion, amending the respondent's name to Commissioner for Fair Trading, Department of Customer Service. The Registrar consulted the parties about this proposed amendment and neither party objected.

Grounds of Appeal

32. Mr Samimi identified the following grounds of appeal in his Notice of Appeal:

> "The NSW Dept of Fair Trading made a decision to cancel the appellant's registration as a builder. The NSW Dept in arriving at its decision took into account of an irrelevant consideration, that is, the event which occurred in Qld. The NCAT however when it made its decision to cancel relied on other grounds to cancel the registration and not the events which occurred in Qld. The NCAT however indicated that the other events were not serious enough to warrant cancellation. The appellant was ambushed. It was unreasonable for NCAT to act in this manner."

33. Under the heading "Application for Leave to Appeal" in the Notice of Appeal, Mr Samimi ticked the box to indicate that he was asking for leave to appeal. He gave as reasons why the Appeal Panel should grant leave:

> "Errors of law.
>
> Unreasonableness.
>
> Taking account of an irrelevant consideration.

> Bias.
>
> The appellant has done nothing wrong here. The Dept of Fair Trading should never have cancelled/refused his licence based on the events in Qld.
>
> The NCAT ambushed the appellant by saying that the other issues were not serious enough to warrant cancellation but then cancelled relying on these very minor matters."

34. At the hearing, Mr Samimi was represented by Mr Hugh Ford, who was granted leave to represent Mr Samimi under s 45(1)(b)(i) of the *Civil and Administrative Tribunal Act 2013* (NSW).
35. Mr Ford argued that the Appeal Panel is not entitled to find errors of law, because it is not a court. He said that the Tribunal was not entitled to engage in an error of law analysis, as this would be turning itself into a court. He further put the submission that, because the Tribunal is not a "Chapter III court," it could not deal with errors of law.

Is the Appeal Panel entitled to make error of law findings?

36. Mr Ford's submissions that the Tribunal is not entitled to make findings about errors of law is misconceived. His reference to the Tribunal not being a "Chapter III court" is apparently to a federal court established under Chapter III of the Commonwealth *Constitution*. The submission appears to be based on the misconception that the separation of powers, which exists at federal level, also applies to State courts and tribunals. It does not (*Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1 at [69]; *Burns v Corbett* [2017] NSWCA 3; (2017) 96 NSWLR 247 at 256 [32]).
37. In any event, even Commonwealth tribunals are entitled to making error of law findings. In *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 64, Bowen CJ and Deane J held that the circumstance that the Administrative Appeals Tribunal is authorized to decide questions of law arising in proceedings before it did not mean that it was (impermissibly) exercising judicial power.
38. Subsections 80(1) and (2) of the *Civil and Administrative Tribunal Act* provide:

> "**80 Making of internal appeals**
>
> (1) An appeal against an internally appealable decision may be made to an Appeal Panel by a party to the proceedings in which the decision is made.
>
> Note. Internal appeals are required to be heard by the Tribunal constituted as an Appeal Panel. See section 27 (1).
>
> (2) Any internal appeal may be made:

> (a) in the case of an interlocutory decision of the Tribunal at first instance—with the leave of the Appeal Panel, and
>
> (b) in the case of any other kind of decision (including an ancillary decision) of the Tribunal at first instance—as of right on any question of law, or with the leave of the Appeal Panel, on any other grounds.

39. The Appeal Panel routinely determines whether an appeal is made on a question of law, for the purposes of s 80(2), or whether leave is required because the appeal is made "on any other grounds." It is difficult to see how s 80(2)(b) could operate effectively if the Appeal Panel did not have power to identify and determine questions of law.
40. It plainly does have such power.

Decision the subject of the Tribunal's review

41. Mr Samimi contended that the decision under review was not the decision not to grant him a licence, but the decision to cancel his contractor licence. The Tribunal considered that it was reviewing the decision to refuse his application for a contractor licence. Mr Samimi submits that the Tribunal made an error of law by purporting to review the wrong decision.
42. This ground was not raised in Mr Samimi's Notice of Appeal. Nevertheless, the respondent has responded to Mr Samimi's submissions about this, and we consider that it is appropriate for us to deal with the issue.
43. As the respondent submitted, the documentary evidence demonstrates that the decision under review is the decision to refuse Mr Samimi's application for a contractor licence. The cancellation letter advised Mr Samimi that there was no right of review of the cancellation decision and that he should make a new application. Mr Samimi promptly did so. After the application was refused, Mr Samimi sought internal review of "the decision made for rejecting the builders licence application." Mr Samimi then sought external review, by the Tribunal, of the internal review decision.
44. The contention that the Tribunal was reviewing the wrong decision is rejected.

Questions of Law

45. As indicated above, Mr Samimi may appeal as of right on a question of law (*Civil and Administrative Tribunal Act*, s 80(2)(b)). The questions of whether the Tribunal's decision was legally unreasonable, whether it took into account an irrelevant consideration and whether it was biased, are all questions of law. Accordingly, leave is not needed for Mr Samimi to appeal on these grounds.
46. Mr Samimi has also appealed on the ground that the Tribunal "ambushed" him. In *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69 at [12], the Appeal Panel said:

> "In circumstances where the appellants are not legally represented, it is apposite for the Tribunal to approach the issue by looking at the grounds of appeal

> generally. It is necessary for the Appeal Panel to determine whether a question of law has in fact been raised, subject to any procedural fairness considerations that might arise to the respondent."

47. Mr Samimi was represented at the hearing, but not by a legal practitioner. We consider that, by alleging that the Tribunal ambushed him, Mr Samimi is claiming, in substance, that he was denied procedural fairness. This raises a question of law and he therefore does not need leave to appeal on this ground.
48. Mr Samimi indicated, on his Notice of Appeal, that he was seeking leave to appeal. To the extent that his Notice of Appeal and submissions identify grounds which do not raise questions of law, he needs the Tribunal's leave to appeal on these grounds (*Civil and Administrative Tribunal Act*, s 80(2)(b)).

Unreasonableness

49. The Notice of Appeal indicates that Mr Samimi is contending that the Tribunal's decision was unreasonable because "the appellant has done nothing wrong"; and possibly also because the Tribunal relied on "very minor matters" when affirming the cancellation decision. In his written submissions, Mr Samimi contended that the Tribunal should not have taken the circumstances that occurred in the Queensland Supreme Court into account because they were irrelevant; that the Tribunal should not have expected Mr Samimi to make certain disclosures because he was not obliged to do so; and that it acted unreasonably because it cancelled Mr Samimi's licence "for relatively minor matters."
50. At the hearing, Mr Ford submitted that the Tribunal "concentrated excessively" on the issue of insurance which was a "minor thing." He also said, relying on *Minister for Immigration and Citizenship v Li* [2014] FCAFC 1; (2013) 249 CLR 332, that the Tribunal's procedure was required to be fair and reasonable. He submitted that it was not fair to "ambush" Mr Samimi by focusing, in the hearing, on the Queensland issues, then upholding the Commissioner's decision on the basis of Mr Samimi's failure to take out the required insurance.
51. The question of whether Mr Samimi was "ambushed" is dealt with below, in the context of considering the procedural fairness ground.
52. The content of the concept of legal unreasonableness is derived in significant part from the necessarily limited task of judicial review (*Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11; (2016) 237 FCR 1 at [8]). The task of a court in determining whether a decision is vitiated for legal unreasonableness is "strictly supervisory" and "does not involve the Court reviewing the merits of the decision under the guise of an evaluation of the decision's reasonableness" (*Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; (2016) 240 FCR 158 at [59]; *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30; (2018) 92 ALJR 713 (SZVFW) at [58]).
53. The Appeal Panel's role, at least when determining whether there has been an error of law on the ground of legal unreasonableness, is similarly limited to considering whether the decision was unreasonable in a legal sense. It is not a matter of the Appeal Panel considering the merits of the decision under review.

54. We do not consider the Tribunal's decision, or the process by which it arrived at that decision, to be legally unreasonable.

55. Mr Samimi acknowledges that his company, Yong Construction Group Pty Ltd, did not obtain the requisite insurance in 2017 but contends that the fact that he did not have insurance is not sufficiently serious to justify a decision to cancel his licence. Mr Samimi submits in his written submissions:

> "It should also be noted that this [not taking out insurance] is a common practice in the industry and that this of itself is not sufficient to warrant the cancellation of the Applicant's licence."

56. There was no evidence before the Tribunal as to how common it is to fail to comply with the requirements to take out home warranty insurance. The relevance of this is, in any event, difficult to discern.

57. It is an offence, under s 92(1) of the *Home Building Act*, to do residential building work under a contract unless a contract of insurance that complies with the Act is in force in relation to that work in the name under which the person contracted to do the work. The maximum penalty is 1,000 penalty units in the case of a corporation and 200 penalty units in any other case. Each penalty unit is equivalent to $110, meaning that the maximum penalty for a corporation is $110,000 (*Interpretation Act 1987*, s 21(1); *Crimes (Sentencing Procedure) Act 1999*, s 17).

58. It is also an offence, under s 92(2) of the *Home Building Act,* to demand or receive a payment under a contract for residential building work, unless the requisite insurance is in place. The maximum penalty is 1,000 penalty units in the case of a corporation and 200 penalty units in any other case.

59. If a contract of insurance required by s 92 of the *Home Building Act* is not in force, in the name of the person who contracted to do the work, the contractor who did the work is generally not entitled to damages in respect of a breach of the contract in relation to that work (*Home Building Act,* s 94(1)).

60. The Tribunal relied upon the failure to obtain the required insurance as one factor amongst many which supported the Commissioner's decision to refuse the licence. However, even if it had relied only upon this matter, we do not accept that it is not sufficiently serious to justify the Commissioner's decision.

61. The legislature has indicated that it considers failure to insure to be very serious, by imposing a fine of up to $110,000 on a corporate licence holder for failing to comply with its insurance obligations. Further, the legislature has provided that a contractor may not receive any money under a residential building contract without insurance, where that insurance is required. It appears, on the evidence which was before the Tribunal, that Mr Samimi's company committed both offences. Mr Samimi's submission that it is common practice not to insure, and that this is a relatively minor matter, indicates a lack of appreciation of the importance of a fundamental part of home building regulation in this State. Home warranty insurance provides home owners with an important safeguard if a builder's work is defective. Mr Samimi's view that this is a relatively minor matter does not reflect the importance given to it in the statutory scheme as a form of consumer protection.

62. Mr Samimi also submits that the Tribunal's decision was unreasonable because it found he was required to make certain disclosures on his renewal forms, but failed to do so. He acknowledges that he should have disclosed his failure to have insurance, but says this is not sufficiently serious to warrant the refusal of his licence application. He says he was not under a duty to disclose the external administration because, at the time of the alleged non-disclosure, he had ceased to be an excluded person under Queensland legislation. Further, he says that the placement of his companies into administration was beyond his control. Mr Samimi also submits that he was not required to disclose the decision of the Queensland District Court because it was a nullity, given the decision of the Queensland Court of Appeal. He relies for this submission on *Minister for Immigration and Multicultural Affairs v Bhardwaj* [2002] HCA 11; (2002) 209 CLR 597.

63. In our view, the Tribunal was entitled to have regard to the failure to disclose the above matters on Mr Samimi's renewal application forms, as a matter relevant to his fitness and propriety. The Commissioner submitted, and we accept, that the both the 2012 and 2015 renewal notices provided a clear requirement that Mr Samimi disclose information about the external administration of his companies, the declaration that he was an excluded person in Queensland, the cancellation of his Queensland licence and that he was involved in a dispute with the Queensland Building and Construction Commission over an insurance claim of $400,000. The Tribunal did not act unreasonably in taking these matters into account.

64. It is not necessary for us to consider whether Mr Samimi was required to disclose the decision of the Queensland District Court, in light of the High Court's decision in *Bhardwaj*, although we are inclined to the view that he was. The District Court decision was handed down after the 2012 renewal application and, by the time of the 2015 renewal application, the Queensland Court of Appeal's decision had been handed down. What Mr Samimi was required to disclose to the Commissioner was the ongoing dispute about whether he owed the Queensland Building and Construction Commission $400,000 in respect of the moneys it paid on an insurance claim. He did not do this.

Bias

65. The Notice of Appeal indicates that "bias" is a ground of appeal. This ground is not developed in Mr Samimi's written submissions. At the hearing, Mr Ford made the allegation that the Tribunal was motivated by bias at the end of his submissions in reply. However, there was no detailed explanation of why this was said to be so.

66. It is not clear whether the allegation is of actual or apprehended bias.

67. The onus of demonstrating actual bias lies with Mr Samimi as the party asserting bias (*Wootten v Godfrey* [2019] NSWCATAP 255 at [25]). Actual bias will not be made out by suspicions, possibilities or other equivocal evidence (*Ikimdzhieva t/as C & L Upholstery Services v Fudala* [2017] NSWCATAP 196 at [49]). An "allegation of actual bias must be distinctly made and clearly proved; cogent evidence is required to support a finding of actual bias; a finding of actual bias should not be made lightly" (*Wootten v Godfrey* [2019] NSWCATAP 255 at [25], citing *South Western Sydney Area Health Services v Edmonds* [2007] NSWCA 16 at [97]; *Reid v Commercial Club (Albury) Ltd* [2014] NSWCA 98 Gleeson JA at [68]).

68. There is nothing to suggest that the Tribunal prejudged this matter or closed its mind to any argument in support of Mr Samimi's position (see *SBBA v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 90 at [15]).

69. Actual bias has not been established.

70. The mere making of an unsubstantiated allegation is not sufficient to establish apprehended bias: *Giddings v Australian Information Commissioner* [2017] FCA 677 at [53]. A claim that a reasonable bystander might reasonably apprehend that a judge (or a tribunal member) has not brought an impartial mind to the resolution of a dispute must be "firmly established": *Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342 at 352.

71. Mr Samimi has not established apprehended bias.

Taking into account irrelevant considerations

72. Mr Samimi submits that the Tribunal took into account an irrelevant consideration, being the events which occurred in Queensland. It seems that the reason Mr Samimi says that those events were irrelevant is his contention that he is not guilty of any wrongdoing. In his written submissions, he submits:

> "It is clear from the decision of Queensland Court of Appeal was that the QBCC should never have paid out the insurance claim. The Applicant had every right to cease work on the site. The Applicant did nothing wrong and further, the QBCC had no cause for complaint about the Applicant. The QBCC should not have made any adverse comment about the Applicant to the NSW Department of Fair Trading. Further, the NSW Department of Fair Trading should not have relied upon the representations of the QBCC. What happened in Queensland was an irrelevant consideration and should have no bearing on the decision by the DFT to cancel the Applicant's licence. Unfortunately, the QBCC comments did have a bearing."

73. Irrelevant considerations are "factors which are extraneous to the proper exercise of the power, so that to take them into account will ... reveal legal error" (*Ballantyne v WorkCover Authority (NSW)* [2007] NSWCA 239, Basten JA at [113]). As Mason J (as his Honour then was) described this ground of review, "where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard" (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 40).

74. The question of whether the *Home Building Act* precludes consideration of certain matters (irrelevant considerations) requires an examination of the relevant statutory power. Here, the power exercised by the Commissioner, and then by the Tribunal standing in the Commissioner's shoes, was the power in s 20(1)(a) of the *Home Building Act* to refuse to issue a licence if not satisfied that the applicant is a fit and proper person to hold a contractor licence. It is questionable whether it is even a power, given that the Commissioner

is required to refuse to issue a licence if the Commissioner reaches that state of satisfaction. The only constraint on the exercise of determining whether an applicant is a fit and proper person to hold a licence is that the Commissioner is required to consider whether the applicant is of good repute, having regard to character, honesty and integrity (*Home Building Act,* s 20(1A)).

75. There is nothing in s 20 of the *Home Building Act* which precludes the Commissioner, or the Tribunal, from taking the Queensland matters into account when determining whether Mr Samimi is a fit and proper person. His conduct in Queensland is not an "irrelevant consideration" in the legal sense of that term.

76. Mr Samimi's argument may also be characterised as being that particular evidence was of little relevance to the Tribunal's determination and, in fairness, should not have been taken into account. This is an argument about the Tribunal's determination of his case, on its merits. To the extent that he is complaining about the merits of the way the Tribunal decided his application, this does not identify a question of law. He would therefore need leave to appeal on the ground that Tribunal should not have placed any weight on the Queensland conduct.

77. We would not grant leave for Mr Samimi to appeal on this basis. The Tribunal was entitled to consider the Queensland proceedings and Mr Samimi's conduct in that State. The Tribunal did not, as we read its reasons, place significant weight on this conduct. Nevertheless, we do not accept Mr Samimi's submissions that what happened in Queensland was irrelevant because he was "vindicated" by the Queensland Court of Appeal. That court did not find that "the QBCC should never have paid out the insurance claim." What it found was that the Queensland District Court should not have given a summary judgment, because the factual dispute was not sufficiently explained such as to allow the primary judge to conclude there was no need for a trial (*Samimi v Queensland Building and Construction Commission* [2015] QCA 106 at [39]). Mr Ford informed the Appeal Panel that further proceedings in the Queensland District Court were pending.

78. Mr Samimi's conduct as a builder in Queensland was plainly relevant to the question of whether he is a fit and proper person to hold a contractor licence in New South Wales. He is entitled to, and did, present his version of events to the Tribunal and provided an account of his conduct which was the subject of the proceedings in the Queensland District and Supreme Courts, and in the Queensland Civil and Administrative Tribunal. This does not mean, however, that the Tribunal should not consider the decisions of those courts and tribunal, or the circumstances underlying the disputes. Those matters are all relevant to Mr Samimi's fitness and propriety. Mr Whitton submitted that Mr Samimi's version of events was not an accurate description of what transpired in the Queensland proceedings. The Tribunal was entitled to take into account the respondent's evidence and submissions about the Queensland matters, as well as Mr Samimi's, and to form its own view.

Procedural fairness

79. Mr Samimi submitted that the Tribunal "ambushed" him by deciding the case on issues other than those which were ventilated at the hearing. He says that the Tribunal should have raised the issue, at the hearing, of his companies being placed into external administration.

He accepts that the matter of the failure to take out insurance for the property at Redfern was raised at the hearing, but considered that the Tribunal member placed little weight on the matter at the hearing. He takes particular exception to the Tribunal's findings about his conduct in relation to the property at Redfern, where his company failed to obtain the necessary insurance. He submits, in his written submissions, that this issue:

> "...was not discussed at all at the NCAT hearing into the matter. It is a completely new matter which has been relied upon by the NCAT to justify its decision to cancel the Applicant's registration. It is not reasonable for the NCAT to raise a matter in those circumstances where the Applicant has not had the opportunity to comment on. The Applicant rejects entirely the comments of the NCAT in respect of the [Redfern] matter.
>
> ... It is clear that the NCAT realised that the case against the Applicant was weak especially given the vindication of the Applicant in Queensland. Instead of accepting this and finding for the Applicant, the NCAT finds a new issue to beat the Applicant over the head with knowing full well that the applicant never got the opportunity to comment or for that matter reject the claims.
>
> ... The Applicant was never given the opportunity to comment on the allegation of poor work."

80. Mr Samimi also complains that the Tribunal should have stated that matters it relied upon, other than the matter of the $400,000 alleged to be owed to the Queensland Building and Construction Commission, were important, if it considered them to be so. He submits that "the NCAT ambushed the Applicant by cancelling the registration upon reliance of these unimportant matters without properly discussing these matters with the Applicant."

81. Mr Samimi's submissions raise the issue of the extent to which the Tribunal is required to put him on notice of proposed findings, or issues it considers relevant to its determination, and to give him an opportunity to respond.

82. The Tribunal is not required "to make a running commentary upon an applicant's prospects of success, so that there is a forewarning of all possible reasons for failure" (*Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, Gleeson CJ and Hayne J at 69 [31]). Procedural fairness does "not require the decision maker to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he reaches a final decision" (*SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152, Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ at [48], citing Lord Diplock in *F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 at 369).

83. In *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* [1994] FCA 1074; (1994) 49 FCR 576 at 591, the Full Federal Court (Northrop, Miles and French JJ) commented that, "[w]ithin the bounds of rationality a decision-maker is generally not obliged to invite comment on the evaluation of the subject's case." However, their Honours this was subject to the qualification that "[t]he subject of a decision is entitled to have his or her mind

directed to the critical issues or factors on which the decision is likely to turn in order to have an opportunity of dealing with it." In addition, "[t]he subject is entitled to respond to any adverse conclusion drawn by the decision-maker on material supplied by or known to the subject which is not an obvious and natural evaluation of that material."

84. These cases and the relevant issues were recently discussed by the Appeal Panel in *Edwards v Commissioner for Fair Trading, Department of Finance, Services and Innovation* [2019] NSWCATAP 208 at [61] to [67].

85. The respondent's written submissions in the proceedings below, apparently filed and served some months before the hearing, identify a number of matters as relevant to Mr Samimi's fitness and propriety to hold a contractor licence. The Commissioner submitted, at [18] of the respondent's written submissions below:

> "The evidence before the Tribunal concerns a number of matters of which the Respondent submits, demonstrates the Applicant is not a fit and proper person namely the following:
>
> > A failure to disclose events or occurrences that would adversely affect his licence renewals in 2012 and 2015;
> >
> > Winding up of Companies of which the Applicant is concerned;
> >
> > The circumstances of the appointment of a controller to Music Corp Pty Ltd (Music Corp);
> >
> > The Applicant's building history in Queensland;
> >
> > Breach of section 92 of the *Home Building Act 1989* (NSW) and the circumstances surrounding that breach;
> >
> > Suspension of the licence in Queensland for Yong Construction Group Pty Ltd (Yong Construction)."

86. The respondent's written submissions below deal with these matters in some detail in the next 43 paragraphs.

87. The respondent also raised, before the Tribunal, the quality of Mr Samimi's work as a matter going to his fitness and propriety. At [76] of its submissions, it contended that there was "sufficient material before the Tribunal to raise concerns as to the Applicant's ability to perform the function of a building contractor to the requisite high standard required." The respondent relied upon examples in the materials of his "poor workmanship" and, in particular, on Mr Samimi's work at Redfern.

88. The matters on which the Tribunal relied, in its reasons, to support its view that Mr Samimi was not a fit and proper person were all raised in the respondent's submissions. Mr Samimi was on notice that the respondent was relying on those matters as being relevant to his fitness and propriety and that the Tribunal might have regard to them.

89. As the Tribunal explained in its reasons, Mr Samimi was examined by his agent, Mr Ford, at the hearing and was also cross examined. Mr Samimi gave evidence in chief about the work he did in New South Wales without insurance and explained the circumstances. He was also cross-examined about this and about his licence renewal forms.

90. The Tribunal summarised the parties' submissions at the hearing in its decision. It described the "central prong of the respondent's submission" as being Mr Samimi's failure to "make full and frank disclosures to the regulator."

91. The Tribunal acknowledged that the focus at the hearing had been on the Queensland matters (at [62]). It then observed that it considered "the more recent matters relating to the New South Wales work" to be of greater weight (at [65]). The Tribunal commented (at [67]):

> "The hearing dealt with these matters in much shorter form than the Queensland matters. Notwithstanding that position, the applicant was clearly on notice of the respondent's evidence on this point over a month prior to the hearing and did not seek to examine the deponent or test the evidence further."

92. The issue of Mr Samimi's lack of disclosure was dealt with in the respondent's submissions and evidence and at the hearing. Mr Samimi was not "ambushed" by the Tribunal's reliance on this issue in its reasons for decision.

93. The issue of Mr Samimi's failure to take out the required insurance was also dealt with in evidence and submissions at the hearing (and prior to the hearing). There was no denial of procedural fairness in respect of this issue.

94. The issue of Mr Samimi's companies being placed into external administration was the subject of the respondent's written submissions and was also touched on at the hearing. Mr Samimi gave evidence as to the circumstances in which one of those companies was wound up (see Tribunal's reasons at [38]). The respondent submitted, at the hearing, that Mr Samimi should have disclosed the winding up of one of at least one of his companies. Contrary to Mr Samimi's submission, the Tribunal did not rely on the external administration of his companies as a matter relevant to his fitness and propriety; rather, it relied upon his failure to disclose this. Mr Samimi was not "ambushed" by the Tribunal's reliance on this matter.

95. The remaining issue is the quality of Mr Samimi's work. Under the heading, "Further consideration and findings," the Tribunal made the following findings (at [82]):

> "... [t]he evidence and material before the Tribunal in respect of the [Redfern] matter supports the finding that the applicant is lacking is certain aspects of his knowledge, so much so that his fitness and propriety remains somewhat diminished from the level required of such a tradesperson."

96. Mr Samimi's poor workmanship, or lack of knowledge, was not a critical issue or factor on which the Tribunal's decision turned. The Tribunal indicated that the key issues were his lack of disclosure and failure to insure (see Tribunal's reasons at [62]-[65]).

97. Mr Samimi was on notice that the respondent relied upon his poor workmanship. He had an opportunity to address this in his submissions. He also had an opportunity to cross-examine the owner of the property at Redfern, who gave evidence that Mr Samimi's

workmanship was poor, but chose not to do so. In these circumstances, we do not consider that the Tribunal was required to put to Mr Samimi that it considered that his knowledge was lacking, or that his workmanship was poor, and give him an opportunity to comment on this. To quote from the Full Federal Court's decision in *Alphaone,* the Tribunal's findings about Mr Samimi's poor workmanship constituted "an obvious and natural evaluation" of the material before it.

98. For these reasons, we dismiss the procedural fairness ground.

Other grounds

99. Mr Samimi sought leave to appeal on grounds which do not raise a question of law in his Notice of Appeal, but has not clearly identified what these grounds are. His written submissions raise a number of matters which go to the merits of the Tribunal's decision, many of which are dealt with above. They include that the Tribunal failed to properly examine the ground of cancellation concerning Mr Samimi's companies being placed under external administration in 1992 and 2002, and that the Tribunal should not have relied on his being an excluded person in Queensland because the six-year period of exclusion has now ended.

100. We do not consider that Mr Samimi has identified any grounds which would justify the grant of leave to appeal. These alleged errors are not, in any event, raised in the Notice of Appeal.

ORDERS

We make the following orders:

(1) To the extent that leave to appeal is required, it is refused.

(2) The appeal is dismissed.

(3) The respondent's name is amended to Commissioner for Fair Trading, Department of Customer Service.

****

I hereby certify that this is a true and accurate record of the reasons for decision of the Civil and Administrative Tribunal of New South Wales.

Registrar